

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 95-1202-E - ORDER NO. 2001-884
AUGUST 23, 2001

IN RE: Pacolet River Power Company, Inc.,)	ORDER DENYING
)	PETITION FOR
Complainant,)	RECONSIDERATION
)	
vs.)	
)	
Duke Power,)	
)	
Respondent.)	
)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Reconsideration of our Order No. 2001-663, dated July 24, 2001, filed by Pacolet River Power Company, Inc. (Pacolet). In addition, Duke Power Company n/k/a Duke Power, a division of Duke Energy Corporation (Duke) has filed a Reply to the Petition. Because of the reasons stated below, the Petition is denied.

First, Pacolet alleges that this Commission failed to acknowledge or recognize the underlying purpose of a "legally enforceable obligation" as set forth in FERC Order No.

69. Pacolet quotes the following language from that Order:

Use of the term "legally enforceable obligation" is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.

We do not believe that this language is relevant in the present case, since the record reflects that Duke has entered into a contract with Pacolet (the existing contract)

and Duke Power has been paying capacity credits under that contract. Further, Duke offered long term contracts with fixed rates equal to Duke's projections of its full avoided cost on six different occasions, even though Duke had no obligation to do so. See Order No. 2001-663 at 10. Thus, there has been no circumvention of any requirement under the FERC Order.

Further, the keystone issue in the present case was actually whether a June 24, 1994 letter from Pacolet's President to Duke constituted a "legally enforceable obligation." Our conclusion that no legally enforceable obligation could be incurred while Pacolet and Duke were already under contract was based on the probative testimony of Duke witnesses Kenneth Keels and Philip T. Lacy.

Pacolet's second allegation of error is that this Commission overlooked or misapprehended the testimony of these witnesses. There was no misapprehension. The sections of testimony quoted in the Petition for Reconsideration are not compelling evidence in Pacolet's favor. These contain a statement of the law in one case, and an answer to a hypothetical question in another case. The second allegation of error must be rejected.

Pacolet's third allegation of error is that this Commission failed to give proper guidance with regard to the Notice that must be given by a qualified facility (QF) to create a legally enforceable obligation at the time the QF is operating under Commission Schedule PP(SC). This notion is also unavailing. In Order No. 2001-663, we gave a comprehensive discussion on the "legally enforceable obligation" concept. Pacolet has provided no evidence for its claim that notice is an issue on which "guidance" from this

Commission is needed. Rather, notice is an issue of contract law as applied to the terms and conditions of individual contracts, which we indeed considered in this case. “Because Pacolet was a party to a valid, existing contract, which was not terminated by either party, and because Pacolet was free to walk away from the negotiations without liability, in Dean Lacy’s opinion, “no legally enforceable obligation” was created.” Order, page 5, pages 12-13. No further “guidance” was necessary to properly dispose of this case.

Pacolet’s fourth allegation of error is that this Commission overlooked or misapprehended PURPA and previous orders of this Commission which require that a QF be given the option of being paid avoided cost calculated at the time the obligation is incurred, or being paid avoided cost calculated at the time of delivery in setting forth on page 9 a summary of the testimony of Duke witness Hager indicating that the utility makes this choice, rather than the qualifying facility. This allegation is also without merit. The testimony reflected Duke witness Hager’s testimony regarding the rate that Pacolet had been paid under the present contract. There is no testimony quoted that would indicate that the utility makes the election of how it is to be paid under avoided cost, rather than the QF. The question of the contract rate was a moot one in any case, given the Commission’s holding that no legally enforceable obligation occurred in the first place.

Lastly, Pacolet states that this Commission has also overlooked or misapprehended the evidence in finding that Duke had not operated in bad faith in that the failure to offer rates to Pacolet based upon avoided cost calculated at the time the obligation is incurred is evidence of bad faith. Again, Pacolet’s contention is without

merit. We would note that Order No. 2001-663 contained a lengthy discussion on the issue of bad faith. See Order No. 2001-663 at 10-11. In those pages, we considered the testimony of witnesses Mierek, Keels, and Watts on the issue of bad faith, carefully considered the testimony, set forth our reasoning, and reached the conclusion that Duke did not act in bad faith in its contract negotiations with Pacolet. We see no reason to change our mind in this regard.


Accordingly, after having considered Pacolet's Petition in this case, along with Duke's Reply, we must reach the conclusion that Pacolet's Petition has no merit. Said Petition is therefore denied and dismissed. We also reaffirm the provisions and holdings of Order No. 2001-663.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)